

DEC 29 2008

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RICK K. VO,

Defendant - Appellant.

No. 07-16889

D.C. Nos. CV-07-00052-ACK
CR-02-00411-ACK

MEMORANDUM *

Appeal from the United States District Court
for the District of Hawaii
Alan C. Kay, District Judge, Presiding

Submitted December 17, 2008**

Before: GOODWIN, WALLACE, and TROTT, Circuit Judges.

Federal prisoner Rick K. Vo appeals from the district court's denial of his 28 U.S.C. § 2255 motion. We have jurisdiction pursuant to 28 U.S.C. § 2253, and we

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

affirm the district court.

Vo contends that his trial counsel committed ineffective assistance pursuant to *Strickland v. Washington*, 466 U.S. 668 (1984), by declining to take further action after the district court reported that a juror had overheard an out-of-court remark by a third party who may have been a government witness. Counsel's tactical decision to proceed with trial was not objectively unreasonable in light of the de minimis nature of the incident. *See United States v. Madrid*, 842 F.2d 1090, 1095 (9th Cir. 1988); *see also Hensley v. Crist*, 67 F.3d 181, 185 (9th Cir. 1995).

Vo also asserts that his trial counsel was ineffective for failing to object to the testimony of Vo's wife pursuant to the marital communications privilege. This contention fails because the privilege would not have applied since the only potentially prejudicial testimony concerned jointly undertaken criminal activity. *See United States v. Marashi*, 913 F.2d 724, 729-30 (9th Cir. 1990).

We further hold that the district court did not abuse its discretion in denying Vo's motion for an evidentiary hearing. *See United States v. Leonti*, 326 F.3d 1111, 1116 (9th Cir. 2003).

To the extent that Vo raises other contentions not certified on appeal, we construe his contentions as a motion to expand the certificate of appealability, and we deny the motion. *See* 9th Cir. R. 22-1(e); *see also Hiivala v. Wood*, 195 F.3d

1098, 1104-05 (9th Cir. 1999) (per curiam).

AFFIRMED.